PREDATORY PRICE CUTTING AS UNFAIR TRADE.

THE methods of the unfair trader are as many and various as the highly specialized ingenuity of a dishonest schemer can invent. The designation "unfair competition" or "unfair trade" seems to have been adopted as a convenient description of offences against commercial morals not included in trade mark infringement.

It was for many years assumed that unless a technical trade mark were violated, no relief could be had. It was soon demonstrated that the acceptance of any such rule opened the door to all manner of commercial knavery, and at an early day judges with consciences and a proper sense of sportsmanship began to decide cases in favor of the complainant which were in no sense trade mark cases, but where the defendant's conduct involved precisely the same wrong — the sale of one trader's goods as those of another — the result being accomplished by some ingenuous contrivance, the deceptive use of personal, geographical or descriptive names, imitated labels or form of package or in some of the infinity of ways which enable one trader to represent his goods as those of a competitor, whose reputation is better and whose trade he covets.[1] The digesters and text-

[1] In Perry *v.* Truefitt, 6 Beav. 66 (1842), Lord Langdale said (p. 73): "I think that the principle on which both the courts of law and of equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man; he cannot be permitted to practice such a deception nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are manufactured of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception and in order to attract to himself that course of trade, or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."

In Croft *v.* Day, 7 Beav. 84 (1843), Lord Langdale said (p. 88): "It has been very correctly said that the principle in these cases is this — that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that

writers at first were puzzled to know where to classify such cases. The author of a text book on Trade Marks would devote a chapter to "Cases analogous to trade marks" and put them there. Finally, the term "unfair competition" was adopted (perhaps from the French Concurrence Deloyale) and has since been used to describe that class of wrongs where by artifice one trader's goods are sold as and for another's.[2] Probably the phrase "passing off" commonly used in England more correctly describes the wrong as we now understand it in this country than "unfair competition," but "unfair competition" is the preferable designation if it can be given the meaning that, as a part of the English language, it ought

other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud."

(1845) Coats *v.* Holbrook, 2 Sandf. Ch. 586, R. Cox, Am. Trade Mark Cases, 20, where not only an imitated name was used, but a simulated mode of putting up goods including the peculiar spools and wrappers employed by the complainant. Vice-Chancellor Sandford said, (p. 594): "A man is not to sell the goods or manufactures of B. under the show or pretense that they are the goods or manufactures of A., who, by superior skill or industry, has established the reputation of his articles in the market. The law will permit no person to practice a deception of that kind, or to use the means which contribute to effect it. He had no right, and he will not be allowed, to use the names, letters, marks, and other symbols by which he may palm off upon buyers, as the manufacture of another, the article he is selling, and thereby attract to himself the patronage that without such deceptive use of such names, etc., would have inured to the benefit of that other person who first got up or was alone accustomed to use such names, marks, letters, or symbols."

(1857) Williams *v.* Johnson, 1 R. Cox, Am. Trade Mark Cases, 214, involved an imitation of the get-up of Williams' Yankee Shaving Soap. Woodruff, J., (p. 222): "It is so palpable as to admit of no reasonable doubt that the devices employed by the defendant were calculated and intended by him to secure the benefit of the reputation which the plaintiffs had acquired. He is in this respect entitled to no favor. The court, in considering the propriety of enjoining him pending the litigation, will not feel called upon to be zealous to aid him by refined distinctions, so that he may evade the letter and violate the scope and spirit of the adjudged cases."

[2] Powell *v.* Birmingham Vinegar Brewery Co., [1894] 3 Ch. Div. 449, [1894] 3 Ch. Div. 462, [1896] 2 Ch. 54, 64, [1897] A. C. 710; Dyment *v.* Lewis, 144 Iowa 509 (1909), 123 N. W. 244, 245, 26 L. R. A. N. S. 73 (note); Reddaway *v.* Banham, [1896] A. C. 199; Bates Mfg. Co. *v.* Bates Numbering Machine Co., 172 Fed. 892, 894 (1909); Weinstock, Lubin & Co. *v.* Marks, 109 Cal. 529, 42 Pac. 142, 145 (1895); Manitowoc Pea Packing Co. *v.* Numsen, 35 C. C. A. 267, 93 Fed. 196, 197 (1899); Shaver *v.* Heller & Merz, 108 Fed. 821 (1901); Garrett *v.* Garrett, 78 Fed. 472 (1896); Pillsbury *v.* Pillsbury-Washburn Flour Mills Co., 64 Fed. 841 (1894); Hires *v.* Consumers' Co., 100 Fed. 809 (1900); R. J. Reynolds Tobacco Co. *v.* Allen, 151 Fed. 819 (1907); Sterling Remedy Co. *v.* Spermine Co., 112 Fed. 1000 (1901); Scriven *v.* North, 134 Fed. 366 (1904); Walter Baker & Co., Ltd., *v.* Slack, 130 Fed. 514 (1904).

to have — that it includes not alone "passing off" but any conduct on the part of one trader which tends unnecessarily to injure another in his business. Universally in this country, until very recently, "unfair competition" was assumed to involve the element of actual or constructive fraud — a misrepresentation, express or implied, concerning the commercial origin of goods. This was so whether the false representation in that respect affected a single trader or a group, for in either event there was deception of the public coupled with damage to the business good will of the individual or group. The wrong may consist, as it does in the common case, where an article is falsely represented to be the product of an individual whose goods are sought after because of public belief in their excellence, in diverting custom to the pirate which would otherwise have gone to the reputable producer. The same wrong less centralized may also be perpetrated, where the false representation concerns geographical origin, by the false use of a reputable place name.

It is well recognized at the present time, though there are some earlier cases to the contrary,[3] that the manufacturer of a product in a certain district has a right as against a person not manufacturing in that district to the use of the name of the district. All or any rightfully and truthfully using the place name may sue.[4] One of a

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[3] New York & R. Cement Co. *v.* Coplay Cement Co., 44 Fed. 277 (1890); 45 Fed. 212 (1891).

[4] Pillsbury-Washburn Flour Mills Co. *v.* Eagle, 86 Fed. 608 (1898); Newman *v.* Alvord, 51 N. Y. 189 (1872); California Fruit Canners' Ass'n *v.* Myer, 104 Fed. 82 (1899); Key West Cigar Mfg. Ass'n *v.* Rosenbloom, 171 Fed. 296 (1909); El Modelo *v.* Gato, 25 Fla. 886, 7 So. Rep. 23, 6 L. R. A. 823 (1890); Keller *v.* Goodrich, 117 Ind. 556, 19 N. E. 196 (1888); Blackwell *v.* Dibrell, 3 Hughes 151, F. C. 1475 (1878); Anheuser-Busch *v.* Piza, 24 Fed. 149 (1885); Southern White Lead Co. *v.* Coit, 39 Fed. 492 (1888); Southern White Lead Co. *v.* Cary, 25 Fed. 125 (1885); Pike *v.* Cleveland Stone Co., 35 Fed. 896 (1888); Northcutt *v.* Turney, 101 Ky. 314, 41 S. W. 21 (1897); Gage-Downs Co. *v.* Featherbone Co., 88 Fed. 213; Elgin Nat. Watch Co. *v.* Loveland, 132 Fed. 41 (1904); Collinsplatt *v.* Finlayson, 88 Fed. 693 (1898); Braham *v.* Beachim, L. R. 7 Ch. D. 848 (1878); Southern *v.* Reynolds, 12 L. T. N. S. 75 (1865); Dunnachie *v.* Young, Scottish Session Cases, 4th Series, vol. 10, p. 874 (1883); Lochgelly Iron & Coal Co. *v.* Christie, Scottish Session Cases, 4th Series, vol. 6, p. 482 (1879); The Canterbury Frozen Meat & Dairy Produce Co., Ltd., *v.* The Christchurch Meat Co., 8 New Zealand Law Rep. 49 (1889).

For the Continental law on this subject see Kohler "das Recht des Markenschutzes," pp. 108–118.

The wine producers in the vicinity of Rheims and Epernay have been diligent and successful in enjoining vineyard proprietors outside of the Champagne district from the geographically false use of the word "Champagne." (Walbaum *v.* X., 5 Propriété In-

number of truthful users of a personal name [5] has a right to stop a person from the false use of the same name and to be compensated in damages proportionately to his interest in the subject matter.[6] A person who is rightfully using the generic name of a patented product has a right to stop a person falsely using the name or using the name in connection with a different product.[7] This probably applies as well to the use of generic names of unpatented articles, that is to say, the manufacturer of an article under a name indicative of a reputable class of goods may stop persons from using the name on goods not of the class where the false representation is sufficiently specific to involve origin as well as class.[8]

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dustrielle 19; Syndicate of Wine Merchants *v.* Ackerman, 19 Journal du droit International Privé 1068; Chapin *v.* The Syndicate of Dealers in Champagne, 20 Journal du droit International Privé 406, decision of Landgericht de Strasbourg, 19 Feb. 1896, 12 La Propriété Industrielle 78.) This controversy culminated in the delimitation decree of Dec. 7, 1909, and the riots which followed.

The brewers at Pilsen succeeded in stopping brewers outside of Pilsen branding their beer "Pilsener," 20 Patent Blatt, No. 12, p. 104.

[5] Pinet *v.* Pinet, 14 R. P. C. 933 (1897); Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296 (1889); DeYoungs *v.* Jung, 25 N. Y. Supp. 479 (1893), 27 N. Y. Supp. 370 (1894); Barber *v.* Manico, 10 R. P. C. 93 (1893); Clark Thread Co. *v.* Armitage, 67 Fed. 896 (1895), 74 Fed. 936 (1896); Wm. Rogers Mfg. Co. *v.* Rogers & Spurr Mfg. Co., 11 Fed. 495 (1882).

[6] Wm. Rogers Mfg. Co. *v.* Rogers & Spurr Mfg. Co., 11 Fed. 495, 500 (1882).

[7] Singer Co. *v.* Hipple, 109 Fed. 152 (1901); Janney *v.* Pan-coast Ventilator Co., 128 Fed. 121 (1904).

[8] In Jaeger *v.* Le Boutillier, 24 N. Y. Supp. 890 (1893), it was held that the complainant had no exclusive right to the name "Jaeger" because indicative of a system, but that the name could truthfully be applied only to woolen garments. Defendant described as "Jaeger," garments made partly of cotton. Held, that notwithstanding the lack of exclusive right in the name complainant could sue. Gildersleeve, J. (p. 901): "The plaintiff's right to use the name 'Jaeger' as designating underwear made in accordance with the Jaeger system, is so qualifiedly exclusive that its right to protection of its use against infringement by others rests upon the ground that such use by them is an untrue or deceptive representation. The application of the name 'Jaeger' or 'Jaeger System' to underwear containing an admixture of cotton is an untrue and deceptive representation, and, as against such a use, the plaintiff is entitled to relief. It is a false representation of fact, which tends to confuse the identity of the defendant's goods, not made after the Jaeger system, with the goods of the plaintiff, made in accordance with that system, and creates a dishonest competition, detrimental to the plaintiff. One of the uses by the defendant of the name 'Jaeger' to designate underwear containing an admixture of cotton must be held to be for the purpose of taking advantage of the reputation the all-wool Jaeger goods have acquired, and of the Jaeger name, as applied thereto. The application of the name 'Jaeger' by the defendant to goods part cotton tends to deceive the purchasers and users of plaintiff's goods, and actually mislead them into buying the goods containing cotton sold by defendant, in the belief that

On the same principle members of societies have a right to stop the use of the name of the society or its emblem or label by persons not members and not entitled to use these various things.[9]

These cases all proceed upon the theory that a community mark represents the reputation or good will of those making up the community or group, that anyone of them has a sufficient interest to stop a wrongful use by an outsider,[10] and that it is wrong by misrepresentation to steal away the customers of an individual trader or of a group of traders.

A trade mark is not a name or device in the abstract, but is a means applied to goods to indicate their commercial origin. It does not exist as an extrinsic thing.[11] When applied to merchandise, a

they are the goods dealt in by the plaintiff. Moreover, since the goods containing an admixture of cotton can be profitably sold at a less price than the all-wool goods, the tendency must be to unfairly divert custom from the plaintiff to the defendant." Jaffe *v.* Evans, 70 N. Y. App. Div. 186 (1902); Anheuser-Busch *v.* Fred Miller Brew. Co., 87 Fed. 864 (1898).

[9] Carson *v.* Ury, 39 Fed. 777 (1889); Society of Accountants *v.* Corporation of Accountants, Scottish Session Cases, 4 Ser., vol. 20, p. 750 (1893); Society of Accountants & Auditors *v.* Goodway (1907), 1 Ch. 489, 76 L. J. Ch. 384, 96 L. T. N. S. 326, 23 T. L. R. 286, 24 R. P. C. 159.

[10] In Wm. Rogers Mfg. Co. *v.* Rogers & Spurr Co., 11 Fed. 495, 500 (1882), Judge Lowell said: "It is further argued that the Rogerses are so many that the court cannot find an intent to appropriate the reputation of one of them more than another; and that, if any suit will lie, it must be by all those who use any trade mark whose distinctive feature is the name 'Rogers.' I believe it to be true that the Greenfield Rogerses did not inquire, nor did the defendants care, whose reputation they were making available; but I am of opinion that any one of those who rightly uses the name may enjoin its interfering use by others."

[11] In Rey *v.* Lecouturier, 25 R. P. C. 268 (1908) (House of Lords), Lord Shaw said: "In short the business of Chartreuse liqueur, as such is carried on by them (the monks), and the English trade marks are therefore trade marks in respect of a thing, the business in which is not and cannot be conducted by the appellants. The trade marks are in the latter; the business in the monks. My Lords, such severance is not legally possible."

Weston *v.* Ketcham, 51 How. Pr. 455, Cox Man. 487 (1876), Sedgwick, J.: "There is no such thing as a trade mark 'in gross' to use that term by analogy. It must be appendant to some particular business in which it is actually used upon, or in regard to specific articles." Mayer *v.* Virginia-Carolina Co., 156 O. G. 539, 35 App. D. C. 425, [1910] C. D. 399, 4 Pomeroy Eq. (1905), sec. 1405, n. 10; Bozon *v.* Farlow, 1 Mer. 459 (1816); Baxter *v.* Connolly, 1 Jac. & W. 576 (1820); Coslake *v.* Till, 1 Russ. 376 (1826); Metropolitan Bank *v.* St. Louis Dispatch, 149 U. S. 436 (1893); Bulte v. Igleheart, 137 Fed. 492 (1905); Allan on Good Will, p. 12; Eiseman v. Schiffer, 157 Fed. 473, 476 (1907); Rey *v.* Lecouturier, 25 R. P. C. 265, 291 (1908); Robertson *v.* Quiddington, 28 Beav. 529 (1860); Musselman's Appeal, 62 Pa. St. 81 (1869); Commonwealth *v.* Ky. Distilleries Co., 116 S. W. 766 (1909); Metropolitan Nat.

trade mark is of value exactly as the information it conveys or implies is of value. If it is valuable that the public should know that a certain article is produced by a certain trader, then the trade mark or other thing by which that information is conveyed is of equal value. The value, however, is not in the trade mark but in the mark plus the information it conveys concerning the origin of the merchandise to which it is applied — the trade mark as symbolizing a business good will or reputation,[12] and it is the good will or reputation which is the property not the symbol as a separate thing.[13]

Bank *v.* St. Louis Dispatch Co., 36 Fed. 722 (1888); People *v.* Roberts, 159 N. Y. 70, 76, 53 N. E. 685 (1899); MacMahan Pharmacal Co. *v.* Denver Chemical Mfg. Co., 113 Fed. 468, 474 (1901); Dietz *v.* Horton, 170 Fed. 865, 871 (1909); Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 448 (1891); Sebastian on Trade Marks, 4 ed., 9; Avery *v.* Meikle, 81 Ky. 73 (1883); Grocers' Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. 310, 312 (1907); MacMillan *v.* Erhmann, 21 R. P. C. 357, 361, affirmed (C. A.) 21 R. P. C. 647 (1904); Spiegel *v.* Zuckerman, 175 Fed. 978, 984 (1910); Messer *v.* The Fadettes, 168 Mass. 140, 46 N. E. 407 (1897); Pinto *v.* Badman, 8 R. P. C. 181, 192 (1891) ; Kidd *v.* Johnson, 100 U. S. 617 (1879); Thorneloe *v.* Hill, 8 Reports 718, 11 R. P. C. 61, 71 (1894); Dixon *v.* Guggenheim; 2 Brews. 321, R. Cox, 559, 576 (1870); McVeagh *v.* Valencia Cigar Factory, 32 O. G. 1124, P. & S. 970, 973 (1885).

[12] State *v.* Bishop, 128 Mo. 373, 31 S. W. Rep. 9, 29 L. R. A. 200 (1895), Burgess, J.: "Abstractly and apart from its application and use, a trade mark has no recognized ownership. Its value is in its employment in marking the goods upon which it is placed. This gives it the character of property. It is then a symbol of reputation or good will." Ball *v.* Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674, 676 (1909); Commonwealth *v.* Ky. Distilleries Co. (Ky.), 116 S. W. 766 (1909); Carroll *v.* McIlvaine, 171 Fed. 125, 128 (1909); Royal Co. *v.* Raymond, 70 Fed. 376, 380 (1895).

[13] While there are a number of cases which hold that the right to a trade mark is property, a little examination will demonstrate that the notion is unsound, and that the true theory is that there is no such thing as *property* in a trade mark. The property is in the business good will which the trade mark symbolizes, not in the trade mark itself. Reddaway *v.* Banham, [1896] A. C. 199, 209, 210, 13 R. P. C. 218, 228.

Lord Herschell: "The word 'property' has been sometimes applied to what has been termed a Trade Mark at common law. I doubt myself whether it is accurate to speak of there being property in such a Trade Mark, though, no doubt, some of the rights which are incident to property may attach to it."

Chadwick *v.* Covell, 151 Mass. 190, 194, 23 N. E. 1068, 1069, 6 L. R. A. 389 (1890).

Holmes, C. J.: "Undoubtedly, the exclusive right to use a certain collocation of words or signs to designate a certain class of goods may have a considerable money value as an advertisement, but the fact that a right would have a money value, if it existed, is not a conclusive reason for recognizing the right. The exclusive right to particular combinations of words or figures for purposes not less useful than advertising — for poetry, or the communication of truths discovered for the first time by the

It seems as if good will in this connection is more a sentiment than the thing we commonly run across in judicial opinions. Good will, to define it inexactly, is the friendliness which a consumer may have toward a particular trader's goods. It is that friendliness which induces him to buy one product rather than another. In order that his inclination toward a particular article may be exercised it is necessary that he be furnished the means of distinguishing the thing he wants to buy from others of a similar kind. Therefore, the trade mark, or whatever it is that enables the purchaser to pick out from among others the thing that he wants, is with him, at least, the

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writer, for art or mechanical design — has needed statutes to call it into being, and is narrowly limited in time. When the common law developed the doctrine of trade marks and trade names, it was not creating a property in advertisements more absolute than it would have allowed the author of Paradise Lost, but the meaning was to prevent one man from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means, and, perhaps, from defrauding the public. It is true that some judges, noticeably Lord Westbury, have preferred to rest the protection to trade marks on the notion of property, rather than of fraud; but it is plain, upon reading his judgments, that he means no more than that the deception which equity will prevent, need not have been intended, — as when a man ignorantly adopts a trade mark already in use, — and that within certain limits a trade mark may be sold, which nobody denies. Hall *v.* Barrows, 4 De Gex, J. & S. 150, 158; Leather Cloth Co. *v.* American Leather Cloth Co., Id. 137. The limitations are clearly marked by the language of Lord Cranworth and Lord Kingsdown in the latter case on appeal to the House of Lords. 11 H. L. Cas. 523, 534, 538. See also Manufacturing Co. *v.* Loog, L. R. 8 App. Cas. 15, 29, *et seq.*; Wotherspoon *v.* Currie, L. R. 5 H. L. 508, 514, 519; Ainsworth *v.* Walmsley, L. R. 1 Eq. 518, 525; Collins Co. *v.* Brown, 3 Kay & J. 423, 426. At least as strict a rule is to be drawn from Pub. St. c. 76, § 1; Gilman *v.* Hunnewell, 122 Mass. 139, 148."

Collins Co. *v.* Brown, 3 K. & J. 423, 69 Full Reprint, 1174 (1857). W. Page Wood, V. C.: "It is now settled law that there is no property whatever in a trade mark, but that a person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it, because the mark denotes that articles so marked were manufactured by a certain person; and no one else can have a right to put the same mark on his goods, and thus to represent them to have been manufactured by the person who originally used that particular mark. That would be a fraud upon the person who first used the mark in the market where his goods are sold."

See Lord Justice James' remarks in Singer Co. *v.* Loog, L. R. 18 Ch. Div. 412, 413 (1880); Judge Loring's observations in Cohen *v.* Nagle, 190 Mass. 4, 76 N. E. 276, 282 (1906), and Chief Justice Knowlton's in Fox *v.* Glynn, 191 Mass. 344, 78 N. E. 89, 91 (1906). See also Canada Publishing Co. *v.* Gage, 3 Can. Com. Law Rep. 119, 129; Turton *v.* Turton, 42 L. R. Ch. Div. 128, 61 L. T. N. S. 571, 576 (1889); Lee *v.* Haley, 22 L. T. N. S. 251 (1869); Powell *v.* Birmingham, 13 R. P. C. 235, 250 (1896); Walton *v.* Crowley, 3 Blatch. 440, R. Cox, 166, 173 (1856); Carroll *v.* McIlvaine, 171 Fed. 125, 129 (1909).

embodiment of the friendliness or good will which he has toward that product. The probability of successive purchases is what the courts call good will.

The theory of all the cases enjoining trade mark infringement, as well as those restraining the diversion of the business of one trader to another by artifice or contrivance, by means of which a false representation concerning the commercial origin of merchandise is made, is that every trader is entitled to the first reward of his honesty, skill or enterprise; that if his product has a reputation and is preferred by purchasers to the goods of others, he has a right to every benefit which ensues from that fact. He has the right to take advantage of this public preference for his goods, and by a trade mark or otherwise to announce to the public the fact of their origin with him and thus visibly to symbolize and perpetuate his reputation.[14] In short, that the good will which he has created belongs

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[14] In McLean *v.* Fleming, 96 U. S. 245, 251 (1877), Mr. Justice Clifford said: "Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer. . . . Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good will of his trade, and in the labels or trade mark which he adopted to enlarge and perpetuate it. . . . A trade mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity."

In Partridge *v.* Menck, 2 Sandf. Ch. 622, 2 Barb. Ch. 101, 1 How. App. Cas. 558, R. Cox, 72, 77 (1848), the Chancellor said: "The court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business. And that having appropriated to himself a particular label or sign, or trade mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against a defendant who attempts to pirate upon the good will of the complainant's friends or customers, or the patrons of his trade or business, by sailing under his flag without his authority or consent."

In Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. S. C. 599, R. Cox, 87, 91 (1849), Judge Duer said: "Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells by a peculiar mark or device in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior repute, as his, may be the means of gaining. His trade mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the

to him alone, and that attempts by others to divert it to themselves are wrongful.

It would seem as if the damage to good will rather than deception of the public is really the important thing, which induces the courts to interfere in trade mark infringement and passing off cases. Whether or not the defendant's conduct is calculated to deceive the public into the belief that his goods are the complainant's is, of course, a material inquiry, because if this false representation is being made, the complainant is certainly damaged for he is in danger of having his customers decoyed away from him by the defendant's misrepresentations and "thus the custom and advantages to which the enterprise and skill of the first appropriator have given him a just right, are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of an-

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mark that he appropriates is not only the evident duty of a court, as an act of justice, but the interests of the public, as well as of the individual, require that the necessary protection shall be given. It is a mistake to suppose that this necessary protection can operate as an injurious restraint upon the freedom of trade. Its direct tendency is to produce and encourage a competition, by which the interests of the public are sure to be promoted; a competition that stimulated effort and leads to excellence, from the certainty of an adequate reward."

Judge Thompson said in Skinner *v.* Oakes, 10 Mo. App. 45, Price & Steuart's Trade Mark Cases, 459, 468 (1881) : "The courts have proceeded upon the twofold principle that the public have a right to know that the goods which bear the signature or mark of a particular manufacturer or vendor are, in fact, the goods of such manufacturer or vendor, and that the manufacturer or vendor of such goods has the right to any advantage which may accrue to him from the public knowing that fact."

In Dennison *v.* Thomas, 94 Fed. 651, 657 (1899), Judge Bradford said: "The function of a trade mark is to indicate to the public the origin, manufacture, or ownership of the articles to which it is applied, and thereby secure to its owner all benefit resulting from his identification by the public with the articles bearing it."

In Congress & Empire Spring Co. *v.* High Rock Congress Spring Co., 57 Barb. 526, R. Cox, 599, 621 (1871), Judge James said: "The principle which underlies this doctrine is that he who by his skill, industry or enterprise has produced or brought into market or service some commodity or article of use, convenience, utility, or accommodation, and affixed to it a name, mark, device, or symbol which serves to designate it as his, is entitled to be protected in that designation from encroachment, so that he may have the benefit of his skill, industry, or enterprise, and the public be protected from the fraud of imitators."

In Williams *v.* Brooks, 50 Conn. 278, P. & S. 654 (1882), Judge Pardee said (p. 659): "The purpose to be effected by this proceeding is not primarily to protect the consumer but to secure to the plaintiffs the profit to be derived from sale of hair pins of their manufacture to all who may desire and intend to purchase them."

other."[15] But it would seem that it is the abstraction for another's use of the custom and advantages to which the enterprise and skill of the first appropriator have given him a just right that gives the right of action rather than the means by which this is accomplished. Public deception cannot be an indispensable element. Deception of the public without more is not a ground for private action. "Somebody," said Lord Justice James, "has a right to say, 'You must not use a name, whether fictitious or real, or a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and therefore deprive me by a fraudulent misstatement of yours from the profits of the business which would otherwise come to me.' That is the sole principle on which the court interferes. The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."[16] Of course fraud does not necessarily mean intentional fraud. The element of actual fraud has long ceased to be important. While it has frequently been said that fraud is the essence of the offence, this can mean no more than constructive fraud. Here, as elsewhere, men are presumed to intend the natural consequences of their acts. "The act, however innocent, is considered constructively fraudulent if the result would tend to unfair trade, to confusion of goods and to interference with the rights of another."[17]

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[15] Mr. Justice Strong in Canal Co. *v.* Clark, 13 Wall. (U. S.) 311, 322 (1871).

[16] Levy *v.* Walker, L. R. 10 Ch. Div. 436, 39 L. T. N. S. 656, 657 (1879).

"The fraud upon the public is no ground for the plaintiffs coming into this court." Lord Eldon in Webster *v.* Webster, 3 Swanst. 493, 36 Full Reprint, 949 (1791).

[17] Manitowoc Co. *v.* Numsen, 93 Fed. 196 (1899). See also the comments of Lord Halsbury in Cellular Clothing Co. *v.* Maxton and Murray, 16 R. P. C. 397, 404 (1899): "The only observation that I wish to make upon that part of the argument is that it seemed to be assumed that a fraudulent intention is necessary on the part of the person who was using a name in selling his goods in such a way as to lead people to believe that they were the goods of another person. That seems to me to be inconsistent with a decision given something like sixty years ago by Lord Cottenham, who goes out of his way to say very emphatically that that is not at all necessary in order to constitute a right to claim protection against the unlawful use of words or things — I say things, because it is to be observed that not only words but things, such as the nature of the wrapper, the mode in which the goods are made up, and so on, may go to make up a false representation; but it is not necessary to establish fraudulent intention in order to claim the intervention of the court. Lord Cottenham says in that case (Millington *v.* Fox, 3 Mylne & Craig, p. 352): 'I see no reason to believe that there has in this case

That a trader cannot be legally injured in his business good will, except by stealing his customers away from him by deceit, cannot be the law. It is the damage, not the manner of it, which is important.

If deception of the public coupled with damage to the business of a particular trader or group of traders is actionable, and deception of the public without damage to such business is not ac-

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been a fraudulent use of the plaintiff's marks. It is positively denied by the answer, and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel; for, although there is no evidence to show that the terms "Crowley" and "Crowley Millington" were merely technical terms, yet there is sufficient to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names, and therefore I stated that the case is so made out as to entitle plaintiffs to have the injunction made perpetual.' That, my Lords, I believe to be the law. It was the law then, and it has not been qualified or altered by the fact that the Trade Marks Act has since been passed, which gives a feasible and perfectly facile mode of remedy in cases in which trade marks apply." See also Gorham Mfg. Co. *v.* Schmidt, 196 Fed. 955 (1912); Gorham Mfg. Co. *v.* Di Salvo, 196 Fed. 956 (1912); Singer Co. *v.* Hipple, 109 Fed. 152 (1901); Estes *v.* Williams, 21 Fed. 189 (1884); Jaffe *v.* Evans, 70 N. Y. App. Div. 190 (1902); Janney *v.* Pancoast Co., 128 Fed. 121 (1904); Saxlehner *v.* Siegel-Cooper Co., 179 U. S. 42 (1900); William Rogers *v.* Rogers & Spurr Co., 11 Fed. 495 (1882); Shaver *v.* Shaver, 54 Iowa, 208, 6 N. W. 188 (1880); Brown Chemical Co. *v.* Frederick Stearns, 37 Fed. 360 (1889); McAndrew *v.* Bassett, 10 Jur. N. S. 550 (1864); Fraser *v.* Nethersole, 4 Kyshe, 273 (1887); Smith *v.* Carron Co., 13 R. P. C. 111 (1896); Powell *v.* Birmingham Vinegar Co., 13 R. P. C. 241, 256 (1896); Millington *v.* Fox, 3 My. & Cr. 338 (1838); Rose *v.* McLean Co., 24 Ont. App. 248 (1897); Slazenger *v.* Pigott, 12 R. P. C. 442 (1895); Reddaway *v.* Bentham, 9 R. P. C. 507 (1892); *Re* Christiansen's T. M., 3 R. P. C. 64 (1886); Dale *v.* Smithson, 12 Abb. Pr. 237, R. Cox, 282 (1861); Phalon *v.* Wright, 5 Phila. 464, R. Cox, 307, 308 (1864); Davis *v.* Kendall, 2 R. I. 566, R. Cox, 112, 114 (1850); Barrows *v.* Knight, 6 R. I. 434, R. Cox, 238, 242 (1860); Sheppard *v.* Stuart, 13 Phil. 117, P. & S. 193 (1879); Hine *v.* Lart, 10 Jur. 106 (1846); Dixon Co. *v.* Guggenheim, 7 Phila. 408 (1870); Royal Co. *v.* Jenkins, P. & S. 309, 311 (1880); Cartier *v.* Carlile, 31 Beav. 292 (1862); Dreydoppel *v.* Young, 14 Phila. 226, P. & S. 423, 425 (1880); Hier *v.* Abrahams, 82 N. Y. 519, P. & S. 438 (1880); Am. Grocer *v.* Grocer, 25 Hun 398, P. & S. 546, 551 (1881); Coleman *v.* Crump, 70 N. Y. 578 (1877); Williams *v.* Brooks, 50 Conn. 278, P. & S. 654, 658 (1882); Tobacco Co. *v.* Commerce, 45 N. J. L. 18, P. & S. 705, 707 (1882); Coffeen *v.* Brunton, 4 McLean 516, R. Cox, 82 (1849); Dale *v.* Smithson, 12 Abb. Pr. 237 (1861); Ainsworth *v.* Walmsley, L. R. 1 Eq. 518 (1866); Lorillard *v.* Wight, 15 Fed. 383, P. & S. 739, 742; Coats *v.* Holbrook, 2 Sandf. Ch. 586, R. Cox, 20, 31 (1845); Amoskeag Co. *v.* Spear, 2 Sandf. S. C. 599, R. Cox, 87, 94 (1849); Royal Co. *v.* Sherrell, 93 N. Y. 331, P. & S. 853(1883); Liggett *v.* Hynes, 20 Fed. 883, P. & S. 898, 902 (1884); Landreth *v.* Landreth, 22 Fed. 41, P. & S. 943, 947 (1884); McCann *v.* Anthony, 3 West Rep. 436, P. & S. 1054, 1061 (1886).

tionable,[18] then it would seem as if it is the element of damage to business that is important rather than the deception of the public; that depriving him of his customers by deceiving them is only one method of unnecessarily injuring a man in his business, and that other conduct on the part of one trader not involving deception of the public, if it results in unnecessary damage to the business of another, ought as well to be capable of redress. It would seem as if relief should depend, not on the element of public deception, but upon the answer to the query, — is business or good will being diverted from one who has created it, to his injury and to the benefit of the parasite? If it is being taken away, whether by

[18] In American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281 (1900), (Circuit Court of Appeals of the Sixth Circuit, composed of Judges Taft, Lurton, and Day), the complainant, who was the only manufacturer of washboards made out of aluminum, sought to restrain the defendant from calling a board not made of aluminum an "aluminum board." The injunction was denied. Judge Day in the course of his opinion observed: "We do not find it anywhere averred that the defendant, by means of its imitation of complainant's trade mark, is palming off its goods on the public as and for the goods of complainant. The bill is not predicated upon that theory. It undertakes to make a case, not because the defendant is selling its goods as and for the goods of complainant, but because it is the manufacturer of a genuine aluminum board, and the defendant is deceiving the public by selling to it a board not made of aluminum, although falsely branded as such, being in fact a board made of zinc material; that is to say, the theory of the case seems to be that complainant, manufacturing a genuine aluminum board, has a right to enjoin others from branding any board 'Aluminum' not so in fact, although there is no attempt on the part of such wrongdoer to impose upon the public the belief that the goods thus manufactured are the goods of complainant. We are not referred to any case going to the length required to support such a bill."

Borden's Condensed Milk Co. *v.* Horlicks Malted Milk Co., 206 Fed. 949.

Borden's Ice Cream Co. *v.* Borden's Condensed Milk Co., 201 Fed. 510, 514.

Saxlehner *v.* Wagner, 216 U. S. 375 (1910), was a case where it was sought by the proprietor of the Hunyadi Janos water to restrain the use of the name "Hunyadi" by the defendant on an artificial water. Mr. Justice Holmes said: "The real intent of the plaintiff's bill, it seems to us, is to extend the monopoly of such trade mark or trade name as she may have to a monopoly of her type of bitter water, by preventing manufacturers from telling the public in a way that will be understood, what they are copying and trying to sell. But the plaintiff has no patent for the water, and the defendants have a right to reproduce it as nearly as they can. They have a right to tell the public what they are doing and to get whatever share they can in the popularity of the water by advertising that they are trying to make the same article, and think that they succeed. If they do not convey, but on the contrary exclude, the notion that they are selling the plaintiff's goods, it is a strong proposition that when the article has a well-known name, they have not the right to explain by that name what they imitate. By doing so, they are not trying to get the good will of the name, but the good will of the goods."

fraud or otherwise, so that its value to its creator is sensibly diminished, why should he not have redress? Why make sneak thievery a crime and legalize highway robbery?

Take a common case of price cutting. An article of recognized merit has an established retail price fixed by the producer of it. It is extensively advertised. The price is known. It is a reasonable price or at least is believed to be by the public or it would not be paid. Under modern trade and advertising conditions articles must be nationally distributed. They must be in the hands of as many retail dealers as possible. The effect of an advertisement of a particular article is not lasting. It creates an immediate impulse to buy or it is of little use. For the advertiser to have a return on his advertising expenditure, the potential purchaser must be able to obey the impulse while he has it. It must not be permitted to wear off. The price of the article must be stated so that the reader of the advertisement may know that it is within his means but, most important of all, while he is in the notion he must be able to buy the thing at the time he wants it at the first shop he sees. He must be made to feel that he can get it at one place as cheaply as another, otherwise he will shop around for a bargain and in the meantime he forgets; the impulse to buy that particular article has evaporated. Therefore, with national advertising, general distribution and uniform prices are indispensable. The retail dealer in such an article need make no effort to sell it. It sells itself. The producer's advertising sends purchasers to his store. The established price guarantees a profit. The dealer is merely an inactive conduit to get the article into the hands of the purchaser. He creates nothing, he need do nothing. His customers, as far as that particular advertised article is concerned, are sent to him by the producer.

After the reputation and popularity of a nationally advertised and thoroughly distributed article are established, everyone who knows the article knows its retail price. The consumer knows it as well as he knows the price of a dollar bill. A retail dealer then, for the purpose of attracting custom to himself, advertises and sells the article at a price conspicuously lower than the established and recognized price. Frequently this price is cost or below, the expectation being that any direct loss sustained will more than be made up by the value of the advertising received and in the sale at en-

hanced prices of other articles whose prices are not known. A dealer, for example, can well afford to sell for sixty-nine cents a watch which is advertised by its producer as a Dollar Watch, and which every one else in his town sells at a dollar, if he can, at the same time, sell for a dollar, a fifty cent chain, or give to the public the impression that he is able to sell everything he deals in, thirty-one cents cheaper than anyone else. The public rushes to buy, not because a watch is advertised at sixty-nine cents, but because a particular watch under a well-known trade mark, which is known to be universally sold at a dollar and believed to be worth it, is offered by this particular dealer at sixty-nine cents. In short, it is the utilization by the dealer of the good will of the producer that makes the situation possible at all. It is the localized good will of the producer in the community in which the retailer does business that makes cutting of prices on the producer's goods worth while. It is the knowledge of the public that the producer's goods are reputable and have the value which the producer has set upon them, by fixing the price that makes their sale at cut prices attractive. One cut price sale invariably provokes others in retaliation. Where one dealer cuts the price of a Dollar Watch to sixty-nine cents, his neighbor, not to be outdone, advertises at fifty-nine cents. Another then cuts to less, with the result that sooner or later, usually sooner, all the dealers in the community are forced to sell this particular watch at a price which yields no profit. The result is that purchasers are persuaded not to buy or to take an unknown article represented to be "just as good." The reputable and popular article is sold under protest or not at all. The local dealer who survives this competition is invariably a department store, or other concern of large resources, which can afford to do business for a time at a loss. The effect of a cut rate war on the producer, whose well advertised and reputable product was the subject of the first attack, is disastrous. Through no fault of his own he is deprived of the distribution of his goods in the community. His market is taken away from him for no reason except that his reputation is good and his products in demand, are of recognized value and known to be worth the price he asks. His advertising expenditure is wasted because ineffective. Purchasers with the impulse to buy cannot gratify it, and it is manifest that such conditions, if at all extensive, will ruin any business. The public are not benefited because, even if for a while

they are able to get an article of recognized value at a cut price, soon they cannot get it at all, or only at great inconvenience.

The first step in this progress of destruction is the utilization, without permission, of the producer's good will for another's private gain, resulting in damage. The result is the same as if the producer's good will were taken away from him by fraud. The effect is identical as if the element of deception, as in ordinary cases of unfair competition, were present.

The law of unfair competition has been extended in the last twenty years to include the suppression of all deceptive artifices by which one trader's customers are taken away from him and transferred to another. The element of deception cannot be the sole consideration. The real injury and the only thing which gives a private right of action is the damage to the business good will of the original trader and its unlicensed utilization by a competitor to his own advantage.

Of late years the courts, in their efforts to circumvent the ingenuity of trade parasites, have begun to enjoin acts of unsportsmanlike dealing, not involving the element of deception, — the duplication of talking machine records,[19] putting of advertising inserts in newspapers by outsiders,[20] and the like, on the ground that this is a diversion of business good will from the creator of it to one who seeks to utilize it for his own benefit. It would seem that predatory price cutting ought to be included in this category.

The effect of malice on otherwise lawful acts is a topic which has provoked endless discussion.[21] In the present instance there is no

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19 Fonotipia Co. *v.* Bradley, 171 Fed. 951 (1909).

20 Press Publishing Co. *v.* Levi Bros. & Co., 3 Trade Mark Reporter, 59. Stapleton, J.: "The cases hereinbefore cited demonstrate the jurisdiction of equity, applied to a variety of situations, to protect property from the consequences of injury and damage attributable to unfair business conduct and methods."

21 See Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. N. S. 599 (note), 16 A. & E. Ann. Cas. 807 (1909); Dunshee *v.* Standard Oil Co., 152 Iowa 618, 132 N. W. 371, 36 L. R. A. 263 (note) (1911); Passaic Print Works *v.* Ely & Walker Dry Goods Co., 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673 (note) (1900); Huskie *v.* Griffin, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. N. S. 967 (note) (1909); Sparks *v.* McCrary, 156 Ala. 382, 47 So. 332, 22 L. R. A. N. S. 1224 (note) (1908); Knickerbocker Ice Co. *v.* Gardiner Dairy Co., 107 Md. 556, 69 Atl. 405, 16 L. R. A. N. S. 746 (note) (1908); Swain *v.* Johnson, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. N. S. 615, 18 HAR. L. REV. 411, 8 Mich. Law Review, 468.

occasion to become entangled with the subtleties connected with the words "malice" and "maliciously." Conceding that the intent with which an act is done is an important consideration where the act is lawful, it is of no consequence where the act is unlawful, and the unauthorized appropriation by a person who has had no hand in its creation of the business good will of another, to his own advantage and the creator's disadvantage and possible ruin, cannot be a lawful act.

It would seem as if an early development of the law ought to be in the direction of putting a stop to predatory price cutting. Of course it must be conceded that the fixing of prices, except perhaps in cases of agency or consignment, cannot be accomplished by contract [22] or, where goods have been sold, by licenses under patents.[23] The essence of the situation here under discussion is not the propriety, legality or necessity of fixing prices. It is in the unnecessary doing of an act calculated to injure and resulting in injury with respect to that most subtile of property rights, business good will. That such conduct is felt to be a real menace is shown by the fact that in at least two widely separated localities it has been made the subject of statutory prohibition. There is a section of the Danish Statute [24] dealing with illegal marking of goods and unfair trading which expressly forbids price cutting, and a recent New Jersey Statute [25] is broad enough to cover it. The

[22] Dr. Miles Medical Co. *v.* John D. Park & Sons Co., 220 U. S. 373 (1911).

[23] Bauer *v.* O'Donnell, 229 U. S. 1 (1913).

[24] "An Act (No. 137) providing penalty for the use of illegal designation of goods or merchandise, for unfair competition, etc." Approved by King Christian X., June 8, 1912.

"Sec. 13. . . . It shall also be unlawful to sell or offer for sale at lower prices, goods in original packages from producers or wholesale merchants — upon which goods their fixed prices for retail sale is stated, — unless the sale falls under the provisions in sec. 6 or the producer or wholesale dealer has given his consent to such reduction of price, or similar authority might be acquired. Offenders may be liable to fines not exceeding 2000 Kr as the circumstances may demand."

Section 6 refers to clearance sales of damaged goods, removal sales, and the like.

[25] Chapter No. 210, Laws of 1913, State of New Jersey. An Act to prevent unfair competition and unfair trade practices. Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. It shall be unlawful for any merchant, firm or corporation, for the purpose of attracting trade for other goods, to appropriate for his or their own ends a name, brand, trade mark, reputation or good will of any maker in whose product said merchant, firm or corporation deals, or to discriminate against the same, by depreciating the value of such products in the public mind, or by misrepresentation as to value or

Tribunal of Commerce of Brussels (March, 1905), has held certain phases of price cutting to amount to unfair trading.[26]

The opponents of efforts to fix and maintain prices invariably contend that where an article is purchased, title passes and control over it by the seller is gone; that it is the property of the purchasing dealer to do with as he pleases. This has long been the favorite argument of those who justify the perpetration of unfair trading by the use of personal names or by the deceptive use of other devices in which no exclusive right can be maintained. A man's name is undeniably his own property, but he is not permitted to use his own property, whether it be his personal name, or any thing else he may own, in such a way as unnecessarily to cause damage to his neighbor.[27] Ownership is not a license to injure an-

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quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale, or a sale by a concern going out of business.

2. Any person, firm or corporation violating this act shall be liable at the suit of the maker of such branded or trade marked goods, or any other injured person, to an injunction against such practices, and shall be liable in such suit for all damages directly or indirectly caused to the maker by such practices, which said damages may be increased threefold, in the discretion of the court.

3. This act shall take effect immediately. Approved April 1, 1913.

A similar act is before the legislature of Georgia and perhaps other states.

[26] A merchant placed on sale with a great flourish of advertising a well-known product of his competitor at a very low price, at the same time puffing a similar article of his own make, which he offered for sale at a much higher price. The decision of the court condemned the defendant's practice and laid down the following principle applicable to such cases: "Nobody supposes that a merchant cannot sell or dispose of his merchandise at a price less than its cost whenever he shall judge it to be for his interest to unload a particular stock or kind of quality of goods, even though he pursue the policy of sacrificing certain articles to gain an advantage in respect to others; for everyone is free to dispose as he will of what he has legitimately acquired. Nevertheless, the merchant cannot by such an act through fraud or malice prejudice another."

Passing upon the circumstance of the case before it, the court decided that the defendant had with premeditation put on sale the plaintiff's merchandise, not with the expectation of suffering the prejudice which would come from its sale at the price fixed, but for the purpose of vaunting his own product and for the sake of the advantage which he would gain by the demand for his goods unfairly created in this way, in the expectation that his goods and not the goods of his rival would be sold. Thereby he sought to create a fictitious reputation for his goods and one unjustifiable by the circumstances of the market and to cause prejudice to another dealer. This is stated to be suggestive of the French law on the subject. La Propriété Industrielle, 1905, p. 233; Singers Trade Mark Laws of the World, 73.

[27] Shaver *v.* Heller & Merz Co., 108 Fed. Rep. 821, 827 (1901). Sanborn, C. J.: "Thus the issue in this case finally narrows to the question whether or not one has the

other. Sixteen String Jack, whose operations on Houndslow Heath have made him immortal, doubtless owned the black mask and

right to use the word 'American' to sell the property of one manufacturer as that of another. From the facts that 'American' is a geographical term, that it may not constitute a trade mark, that no one may have a proprietary interest in it, counsel for the appellants draw the conclusion that everyone has the right to use it to palm off the goods of one vendor as those of another. Does the conclusion necessarily follow from the premises. Everyone has the right to use and enjoy the rays of the sun, but no one may lawfully focus them to burn his neighbor's house. Everyone has the right to use the common highway, but no one may lawfully apply it to purposes of robbery or riot. Everyone has the right to use pen, ink, and paper, but no one may apply them to the purpose of defrauding his neighbor of his property, of making counterfeit money, or of committing forgery. The partner has the right to use his firm's name, but he may not lawfully employ it to cheat his copartner out of his property. Everyone has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such a fraud by the use of descriptive and geographical terms which are not susceptible of monopolization as trade marks as effectually as it prohibits its commission by the use of any other expressions."

And Judge Sage in Garrett *v.* Garrett, 78 Fed. 472, 477 (1896), in answer to a similar argument, observed: "It was contended for the defendant, upon the hearing, that every man has a right to the use of his own name in business, and, as to the order of injunction below restraining defendant from using white paper for its labels, that every person has a constitutional right to use white paper. These propositions, in the abstract, are undeniably true, but counsel for the time overlooked the fact that, wherever there is an organic law, wherever a constitution is to be found as the basis of the rights of the people, and as the foundation and limit of the legislation and jurisprudence of a government, there the mutual rights of individuals are held in highest regard, and are most jealously protected. Always, in law, a greater right is closely related to a greater obligation. While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business, nor to commit a fraud upon his neighbor, nor a trespass upon his neighbor's rights or property; and, while it is true that every man has a right to use white paper, it is also true that he has no right to use it for making counterfeit money, nor to commit a forgery. It might as well be set up, in defense of a highwayman, that, because the constitution secures to every man the right to bear arms, he had a constitutional right to rob his victim at the muzzle of a rifle or revolver. It has been held, with reference to trade marks, that a man has not the right to use even his own name so as to deceive the public, and make them believe that he is selling the goods of another of the same name. Holloway *v.* Holloway, 13 Beav. 209 (1850). In William Rogers Mfg. Co. *v.* Rogers & Spurr Mfg. Co., 11 Fed. 495 (1882), it was held that, while 'anyone has a right to the use of his own name in business, he may be restrained from its use if he uses it in such a way as to appropriate the good will of a business already established by others of that name; nor can he, by the use of his own

pistol which were the necessary tools of his occupation. A man with his own rifle may lawfully shoot at a target. He ought not in all conscience, however, to be permitted to pot his neighbors and defend on the ground that he owns the gun.

If it be objected that relief against injurious price cutting would be novel, it may be recalled that Lord Hardwicke in 1742 [28] refused to enjoin the imitation of a trade mark on that ground, saying:

"Every particular trader has some particular mark or stamp, but I do not know of any instance of granting an injunction here to restrain one trader from using the same mark with another, and I think it would be of mischievous consequence to do it. . . . An objection has been made that the defendant in using this mark prejudices the plaintiff by taking away his customers, but there is no more weight in this than there would be to an objection to one inn-keeper setting up the same sign with another."

It will also be recalled that in 1891 [29] Mr. Justice Bradley declined to enjoin the false use of a geographical name at the suit of

name, appropriate the reputation of another by fraud, either actual or constructive.' The same ruling was made in Rogers Co. *v.* Wm. Rogers Mfg. Co., by the Court of Appeals of the Second Circuit, as reported in 17 C. C. A. 576, 70 Fed. 1017 (1895). In these last two cases the name was used as a part of the name of a corporation. In the last case the court cites Manufacturing Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395 (1887), and Rogers *v.* Rogers, 53 Conn. 121, 1 Atl. 807, and 5 Atl. 675 (1885), where a large number of reported cases upon this portion of the law of trade marks is collected. See also Landreth *v.* Landreth, 22 Fed. 41 (1884), where the court held that, 'while a party cannot be enjoined from honestly using his own name in advertising his goods and putting them on the market, where another person, bearing the same surname, has previously used the name in connection with his goods in such manner and for such length of time as to make it a guaranty that the goods bearing the name emanate from him, he will be protected against the use of that name, even by a person bearing the same name, in such form as to constitute a false representation of the origin of the goods, and thereby inducing purchasers to believe that they are purchasing the goods of such other person.'"

[28] Blanchard *v.* Hill, 2 Atk. 484 (1742).

Lord Mansfield in 1783, Singleton *v.* Bolton, 3 Doug. 293, was of a different mind, saying: "If the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie."

[29] New York & Rosendale Cement Co. *v.* Coplay Cement Co., 44 Fed. 277 (1890), where it was attempted by a dealer manufacturing cement in the town of Rosendale to enjoin the false use of that name on cement made elsewhere.

In 1898, Pillsbury Washburn Flour Mills Co. *v.* Eagle, 86 Fed. 608, where the millers of Minneapolis rightfully using the words "Minnesota Patent, Minneapolis, Minn." upon their flour successfully enjoined a grocer selling flour produced in Milwaukee from falsely using the words "Minnesota Patent, Minneapolis, Minn." thereon, Judge Bunn, speaking for the Circuit Court of Appeals of the Seventh Circuit, observed: "To still say that the court has no jurisdiction or power to grant relief is to fly in the

one truthfully using it, on the ground that to grant such relief "would open a Pandora's box of vexatious litigation." Because a notion is new it is not necessarily unsound. It has always been the boast of courts of equity that they adjust themselves to modern instances and as new wrongs develop new remedies will be applied or old remedies will be enlarged to meet the changed conditions.

"It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance has been greatly affected by prevalent economic theories. For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individuals from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition, and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well being of society requires that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person."[30]

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face of the well-grounded principle running through all the cases . . . This rule is so well established, is so general and elastic in its application, and so consonant to the general principles of equity jurisprudence, that it would be difficult to frame a case coming fairly within its spirit and meaning in which a court of chancery will not find a way to afford the proper relief."

[30] Elliott, J., in Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. N. S. 599 (1909).